Resolving Motions in Immigration Proceedings

Resolving Motions in Immigration Proceedings

Jeff Hartman & Justin Globerson
Tacoma and San Francisco Immigration Courts

Learning Objectives

- Provide an understanding of the **types** of motions filed in Immigration Court and how to address them
  - Pre-decision Motions
  - Post-decision Motions

- Discuss the **limitations and exceptions** that apply to motions to **reconsider** and **reopen**

- Identify resources and practical **tips to assist you in adjudicating motions**

Motions – Jurisdiction and Basics

- An IJ has no authority over a motion unless a charging document has been filed with the Immigration Court (except for custody redeterminations under 8 C.F.R. § 1236.1(d)(1)).
  - If an IJ has **already decided** a case and no appeal has been filed, the IJ **retains jurisdiction** over a subsequently-filed motion.
  - If the **BIA rendered the last decision** in a case, the **BIA**, not the IJ, **retains jurisdiction** over a subsequently-filed motion. *See* 8 C.F.R. § 1003.23(b)(1).

- Statements made by counsel in a motion are **not evidence**. *See INS v. Wang*, 450 U.S. 139, 143 (1981) (finding unsupported statements by counsel or the alien in the motion have no evidentiary value).

- Type of motion is determined by its **substance, not its title**. *See, e.g., Mohammed v. Gonzales*, 400 F.3d 785, 792 (9th Cir. 2005).

Types of Pre-decision Motions Before the Court

- Motion to Dismiss/Terminate
- Motion to Suppress
- Motion to Pretermit Application for Relief
- Motion to Administratively Close
- Motion to Continue
- Motion to Advance Hearing
- Motion to Change Venue
- Motion to Substitute or Withdraw as Counsel
- Motion for Telephonic or Waiver of Appearance
- Motion for Subpoena and/or Deposition
- Motion to Sever/Consolidate
- Motion for Telephonic Witness Testimony
- Motion to Amend

Types of Post-decision Motions Before the Court

- Motion to Reopen (and Rescind In Absentia Order)
- Motion to Reconsider
- Motion to Reissue
- Motion to Amend
- Motion to Recalendar

Pre-decision Motions - Responses

A motion is deemed unopposed unless a timely response is made. 8 C.F.R. § 1003.23(a).

- IJs may set and extend time limits for the filing of motions and replies. 8 C.F.R. § 1003.23(a).
- IJs may deny a motion before the close of the response period without waiting for a response from the opposing party if the motion does not comply with the applicable legal requirements.

Practice Tip: An application, motion, or document is not deemed "filed" until it is received by the Immigration Court. All submissions received by the Immigration Court are date-stamped on the date of receipt.

Filing Deadlines

- Non-Detained Cases
  - For non-detained master calendar and individual hearings, any filing (including a motion) must be submitted at least **15 days prior to the hearing** if the party is requesting a ruling prior to or at the hearing; any **response** must be submitted **within 10 days** after the original filing.

- Detained Cases
  - For master calendar and individual calendar hearings involving detained aliens, filing deadlines are specified by the Immigration Court. *See* ICPM, Chapter 3.1(b)(i)(B), (ii)(B).

Motions to Continue - Basics

"The Immigration Judge may grant a continuance for **good cause** shown." 8 C.F.R. § 1003.29; *see also* 8 C.F.R. § 1240.6.

- IJs must "articulate, balance, and explain" all **relevant factors** in determining whether to deny continuance request. *Matter of Hashmi*, 24 I&N Dec. 785, 794 (BIA 2009).
- Factors to consider in continuance for adjudication of a visa:

  (1) DHS response to the motion to continue; (2) whether the underlying visa petition is prima facie approvable; (3) the alien's statutory eligibility for adjustment of status; (4) whether the application for adjustment of status merits a favorable exercise of discretion; and (5) the reason for the continuance and other relevant procedural factors. *Matter of Hashmi*; *see Matter of Sanchez-Sosa*, 25 I&N Dec. 807 (BIA 2012) (applying factors (1),(2), and (5) to continuance for U visa).

Motions to Continue - Basics

- For appellate purposes, the decision to grant or deny is within the sound **discretion** of an IJ. The IJ's decision will not be reversed unless the alien demonstrates that denial caused "actual prejudice and harm and materially affected the outcome of his case." *Matter of Sibrun*, 18 I&N Dec. 354, 356-57 (BIA 1983).

- *See Matter of L-A-B-R-*, 27 I&N Dec. 245 (A.G. 2018) (AG reviewing whether good cause exists to grant continuance for a collateral matter to be adjudicated).

Motions to Advance

- Motions to advance are generally disfavored, but may be appropriately filed when there is **imminent ineligibility** for relief or there is a **health crisis** necessitating immediate IJ action. *See* ICPM, Chapter 5.10(b).

Motions to Change Venue

"The Immigration Judge, for **good cause**, may change venue only upon motion by one of the parties, and after the charging document has been filed with the Immigration Court." 8 C.F.R. §1003.20(b).

- The decision to grant is **discretionary**. Factors to consider include: administrative **convenience**; expeditious treatment of case; location of **witnesses**; cost of transporting witnesses or evidence to a new location; alien's place of **residence**. *Matter of Rahman*, 20 I&N Dec. 480 (BIA 1992).

Motions to Consolidate or Sever

- IJs have the implicit authority to consolidate or sever the cases of different respondents to **promote administrative efficiency**. 8 C.F.R. § 1003.10(b); *Matter of Taerghodsi*, 16 I&N Dec. 260 (BIA 1977).
  - IJs may similarly sever cases in the exercise of **discretion** upon the filing of a motion by a party. ICPM, Chapter 4.21(b).

- Consolidation is generally limited to cases involving **immediate family members**. The Practice Manual presumes consolidation only upon filing of motion by a party. ICPM, Chapter 4.21(a).

Motions to Administratively Close

- Administrative closure has historically been longstanding practice in Immigration Court proceedings.
  - The BIA viewed the administrative closure of proceedings as an **administrative convenience** which allows the temporary removal of cases from the docket in certain situations. *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012) (weighing various factors, including opposition by either party).

- The Attorney General overruled *Matter of Avetisyan* in ***Matter of Castro-Tum***, 27 I&N Dec. 271 (A.G. 2018).
  - Attorney General declined to exercise general authority to permit administrative closure.
  - Regulations allow administrative closure only in **specific categories** of cases.
  - Administrative closure is appropriate only for cases in which it is **authorized by regulation** or a judicially approved settlement.

Motions for Subpoenas and Depositions

- If an IJ is satisfied that a **witness** is not **reasonably available** at the place of hearing and that the testimony of such witness is **essential**, the IJ may order the taking of a deposition. 8 C.F.R. § 1003.35(a).

  - If a party seeks a subpoena, he or she must state in writing or at the hearing, what is **expected to be proven**, and the party must show affirmatively that **diligent efforts** were made, **without success**, to produce the same. 8 C.F.R. § 1003.35(b)(2).

  - Upon being satisfied that the **witness will not appear** to testify or produce evidence and the testimony or evidence is "essential," the IJ "shall" issue a subpoena. 8 C.F.R. § 1003.35(b)(3).

Motions to Suppress

- The test for admissibility of evidence is whether it is **probative** and its use must be **fundamentally fair** so as not to deprive an alien of due process of law. *See, e.g.*, *Espinoza v. INS*, 45 F.3d 308 (9th Cir. 1995).
- To trigger the exclusionary rule in immigration proceedings, respondent must first establish: (1) a **prima facie** case that law enforcement violated his Fourth Amendment rights; and (2) that the Fourth Amendment violation was **egregious**. *Matter of Barcenas*, 19 I&N Dec. 609, 611 (BIA 1988). The burden then shifts to the government to defend the constitutionality of the search or seizure.
  - *Note:* In the Ninth Circuit, make sure to review *Sanchez v. Sessions*, 2018 WL 4495220 (9th Cir. Sept. 19, 2018).

Practice Tip: DHS's Record of Deportable/Inadmissible Alien (**Form I-213**) is considered **inherently trustworthy** and admissible to prove alienage and removability absent an indication that it contains incorrect information or was obtained by coercion or duress

Motions to Dismiss/Terminate Proceedings

- Terminate: motion requests that the IJ **end proceedings**, arguing the charge(s) on the NTA **cannot be sustained**. INA § 240(c)(1)(A) (IJ "shall" decide "whether alien is removable")
- Dismiss: DHS requests the IJ **conclude proceedings** where (1) the NTA was **"improvidently issued"**; (2) circumstances have changed since the NTA was issued such that "continuation is no longer in the best interest of the government.";or the other enumerated grounds. 8 C.F.R. § 1239.2(c).
- Because IJs "have no inherent authority to terminate or dismiss removal proceedings . . . they may not [do so] those proceedings for reasons other than those expressly set out in the relevant regulations or where DHS has failed to sustain the charges of removability." *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462, 463 (A.G. 2018)
- *Practice Tip:* Refer to motions to terminate chart.

Motions to Pretermit

- Motion to Pretermit Application for Relief due to **lack of statutory eligibility**. *See, e.g., Matter of Velasquez*, 25 I&N Dec. 278 (BIA 2010).

Post-decision Motions

- Motion to Reopen (and Rescind In Absentia Order)
  - Sua Sponte Authority to Reconsider or Reopen
- Motion to Reconsider
- Motion to Reissue
- Motion to Amend

Note: An IJ order is final upon expiration of appeal period. INA § 101(a)(47)(B)(ii).

Motions to Reconsider

- Only **one** motion to reconsider is allowed. INA § 240(c)(6)(A); 8 C.F.R. § 1003.23(b)(1).

- The motion must be filed **within 30 days** of the date of entry of a final administrative order. INA § 240(c)(6)(B); 8 C.F.R. § 1003.23(b)(1).

- A motion to reconsider asserts that the IJ made a **factual or legal error** at the time IJ rendered the previous decision. INA § 240(c)(6)(C); 8 C.F.R. § 1003.23(b)(2); *Matter of Cerna*, 20 I&N Dec. 399, 402 (BIA 1991).

- IJ may reconsider any case in which he or she has made a decision. 8 C.F.R. § 1003.23(b)(1).

Motions to Reopen - Basics

- A motion to reopen seeks to reopen proceedings so that **new evidence** can be presented. INA § 240(c)(7)(B); 8 C.F.R. § 1003.23(b)(1).
- Only **one motion to reopen is allowed** unless an exception applies. INA § 240(c)(7)(A); 8 C.F.R. § 1003.23(b)(1).

- A motion must be filed **within 90 days of the date of a final administrative order**. INA § 240(c)(7)(C)(i); 8 C.F.R. § 1003.23(b)(1).

- When a motion to reopen is opposed by either party, the IJ must state in writing the reasons for the decision.

Motions to Reopen - Basics (continued)

- The motion "shall" state **new facts** to be proven at the hearing if the motion is granted and "shall" be supported by affidavits and other evidentiary material. 8 C.F.R. § 1003.23(b)(3).
  - If granting, an IJ must find the evidence to be **material and not previously available** and could not have been discoverable or presented at prior hearing.

- If seeking new relief, the alien must **submit applications**. 8 C.F.R. § 1003.23(b)(3).

- **No automatic stay** applies, unless motion involves **in absentia order**. 8 C.F.R. § 1003.23(b)(v).

Motions to Reopen – Burden and Prima Facie Eligibility

- In seeking to reopen removal proceedings, the **burden is upon the moving party** to establish that reopening is warranted.
  - Burden of proof varies depending upon the basis for the motion. *Compare Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992) (alien who has already had hearing on merits of relief bears "heavy burden" of showing new evidence "would likely change the result in the case") *with Matter of M-S-*, 22 I&N Dec. 349 (BIA 1998) (alien who is motioning for previously unavailable relief need present sufficient evidence to show "a reasonable likelihood of success on the merits.") and *Matter of L-O-G-*, 21 I&N Dec. 413 (BIA 1996) (same).

- The applicant must show ***prima facie*** eligibility for the underlying substantive relief requested. *See INS v. Wang*, 450 U.S. 139, 145 (1981).

- IJs may deny a motion in the exercise of discretion even if the alien has established prima facie eligibility

Regulatory Departure Bar

- The regulations contain a "departure bar" which treats the departure of an alien from the United States as a **withdrawal of their motion**. 8 C.F.R. § 1003.23(b)(1).
  - However, the BIA and Circuit Courts have *significantly* curtailed the applicability of the departure bar. *See, e.g., Matter of Bulnes*, 24 I&N Dec. 57 (BIA 2009); *Toor v. Lynch*, 789 F.3d 1055, 1057 n.1 (9th Cir. 2015) (compiling cases and holding "the regulatory departure bar **invalid** irrespective of **how the noncitizen departed**[.]").

Exceptions to Time and Number Limitations

- Motions to Reopen and Rescind prior In Absentia Order of removal
- Joint Motions
- DHS Motion Based on Fraud/Crime
- Motions to Reopen to Apply/Reapply for Asylum, Withholding of Removal or Protections under the Convention Against Torture
- Motions to Reopen due to Ineffective Assistance of Prior Representative and Equitable Tolling
- Motions to Reopen under the Violence Against Women Act (VAWA)
- Other Special Motions
- Sua Sponte Authority

Rescission of In Absentia Order of Removal

- An alien in removal proceedings must file a motion to rescind an order of removal entered in absentia **within 180 days** of the date of the order if he or she seeks to demonstrate **exceptional circumstances** for failure to appear. INA § 240(e)(1); 8 C.F.R. § 1003.23(b)(ii).

- A motion may be filed at **any time**, if the basis is **lack of proper notice** or if the alien was in custody and the failure to appear was through no fault of the alien.
  - This applies to cases in which service of the Notice to Appear occurs after April 1, 1997. INA § 240(b)(5) of the Act; 8 C.F.R. § 1003.23(b)(4)(ii).

Practice Tip: The filing of a motion based either on **notice or exceptional circumstances** serves as an **automatic stay** of removal until the IJ issues a decision. INA § 240(b)(5); 8 C.F.R. § 1003.24(b)(4)(ii).

Joint Motions, Fraud, Crimes

- There are **no time or number limitations** for motions to reopen "agreed upon by all parties and **jointly** filed."
  8 C.F.R. § 1003.23(b)(4)(iv).

- Time and number limitations on motions do not apply if **DHS brings** a motion based on **fraud** in the original proceeding or a **crime** that would support termination of asylum. *See* 8 C.F.R. § 1003.2(c)(3)(iv).

Changed Country Conditions

- Time and number limitations on motions do not apply if an application for asylum, withholding, or protection under the United Nations Convention Against Torture is based on **changed country conditions** in the country of return or to where the alien was ordered removed, if the evidence is **material** and **not previously discoverable**. INA § 240(c)(7)(C)(ii); 8 C.F.R. § 1003.23(b)(4)(i).

Ineffective Assistance of Counsel

- If the alien establishes **due diligence** to toll the deadline, and there appears to have been **prejudice**, then explore whether the alien has met the procedural requirements for showing ineffective assistance of counsel under *Matter of Assaad*, 23 I&N Dec. 553 (BIA 2003) and *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988):

  (1) submit an **affidavit** explaining his agreement with former counsel regarding his legal representation; (2) present evidence that prior counsel has been **informed of the allegations against** her and given an opportunity to respond; (3) either show that a **complaint** against prior counsel was filed with the proper disciplinary authorities or explain why no such complaint was filed.

Equitable Tolling

- Generally, equitable tolling is available "when a petitioner is prevented from filing because of **deception, fraud, or error**, as long as the petitioner acts with **due diligence** in discovering the deception, fraud, or error." *Iturribarria v. INS*, 321 F.3d 889, 897 (9th Cir. 2003).
- **Diligence** – The threshold issue is whether the alien has established due diligence in pursuing the case during the time sought to be tolled.
- **Prejudice** – Circuit courts generally require that **prejudice** be shown in order to establish that equitable tolling of the time and number limits are warranted.

Practice Tip: Different circuits have slightly different prejudice standards – use circuit specific language.

Sua Sponte Authority to Reopen or Reconsider

"An Immigration Judge may **upon his or her own motion at any time**, or upon motion of the [DHS] or the alien, reopen or reconsider any case in which he or she has made a decision, unless jurisdiction is vested with the Board of Immigration Appeals." 8 C.F.R. § 1003.23(b)(1).

- "[A]n **extraordinary remedy** reserved for truly **exceptional situations**." *Matter of G-D-*, 22 I&N Dec. 1132, 1134 (BIA 1999) (citations omitted).
  - Changes in Law – *Matter of G-D-*, 22 I&N Dec. 1132 (BIA 1999) (change in law must be significant, fundamental change, not an incremental); *see also Matter of G-C-L-*, 23 I&N Dec. 359 (BIA 2002).
  - Vacated Convictions – *Matter of Chavez-Martinez,* 24 I&N Dec. 272 (BIA 2007).

Resources

- Immigration Court Practice Manual
- Circuit Court Guidance
  - Published-Case-Summaries
  - Ninth Circuit Immigration Outline
- OCIJ Guidance and Publications Pages
  - Draft Decision Bank
- Operating Policies and Procedures Memoranda (OPPMs)


DEPARTMENT OF JUSTICE
QUI PRO DOMINA JUSTITIA SEQUITUR
Executive Office for Immigration Review